No. 09-1150

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNIVERSAL TRADING & INVESTMENT CO., INC.,

Petitioner,

v.

PETRO MIKOLAYEVICH KIRITCHENKO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS PETER KIRITCHENKO, IZABELLA KIRITCHENKO, LUDMILLA KIRITCHENKO, BRANCROSS U.S. HOLDINGS, INC., BRC PROPERTY HOLDINGS, LLC, XANADU PROPERTY HOLDINGS, LLC, ABS TRADING, INC. AND MICHAEL MENKO

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STATEMENT OF QUESTIONS PRESENTED

Respondents submit that the following questions more accurately reflect the issues presented in the Petition for Writ of Certiorari:

1. Whether the district court and the Ninth Circuit Court of Appeals correctly determined that the Petitioner had no standing as a real party in interest because a purported Ukrainian assignment of claims to Petitioner was invalid under Ukrainian law.

2. Whether the district court and the Ninth Circuit Court of Appeals correctly considered the applicability of the act of state doctrine.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents BRC Property Holdings, LLC, Brancross U.S. Holdings, Inc., Xanadu Property Holdings, LLC, and ABS Trading, Inc. submit the following Corporate Disclosure Statements:

1. BRC Property Holdings, LLC ("BRC") is owned by Brancross U.S. Holdings, Inc. BRC is a limited liability company and therefore has no stock.

2. Brancross U.S. Holdings, Inc. does not have any parent corporation or any publicly held corporation that owns 10% or more of its stock.

3. Xanadu Property Holdings, LLC ("Xanadu") is owned by Brancross U.S. Holdings, Inc. Xanadu is a limited liability company and therefore has no stock.

4. To the best of respondents' knowledge, ABS Trading, Inc. does not have any parent corporation or any publicly held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
STATEMENT OF QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE PETITION	8
I. The Courts Below Properly Concluded That Petitioner Lacked Standing As a Real Party in Interest	8
II. The Courts Below Properly Considered the Applicability of the Act of State Doctrine	10
III. This Court Should Not Decide the Scope of Implied Powers Under the Ukrainian Constitution	13
CONCLUSION	14

TABLE OF CITED AUTHORITIES

Page

Cases

Banco Nacional de Cuba v. Sabbatino,
376 U.S. 398 (1964) 12

Liu v. Republic of China,
892 F.2d 1419 (9th Cir. 1989) 11, 12

Maltina Corp. v. Cawy Bottling Co.,
462 F.2d 1021 (5th Cir. 1972) 12

Republic of Iraq v. First National Bank,
353 F.2d 47 (2nd Cir. 1965) 12

Tabacalera Severiano Jorge v. Standard Cigar Co.,
392 F.2d 706 (5th Cir. 1968) 12

Underhill v. Hernandez,
168 U.S. 250 (1897) 12

Rules

Federal Rule of Civil Procedure

Rule 17 ..... 6, 9, 11

Rule 17(a) 1, 3, 4

Rule 44.1 ..... 2, 5, 13

Rule 60(b) 6

STATUTORY PROVISIONS INVOLVED

Respondents submit that the constitutional provisions and federal statutes referenced in the Petition are not implicated by the decisions of the district court and the Ninth Circuit Court of Appeals. Instead, the following Federal Rules of Civil Procedure are relevant to the Petition:

1. Federal Rule of Civil Procedure 17(a)

(a) Real Party in Interest.

(1) ***Designation in General.*** An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) ***Action in the Name of the United States for Another's Use or Benefit.*** When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(3) ***Joinder of the Real Party in Interest.*** The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

2. **Federal Rule of Civil Procedure 44.1. Determining Foreign Law**

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

STATEMENT OF THE CASE

Petitioner Universal Trading & Investment Co. ("UTI") is a Massachusetts corporation that brought this lawsuit in 1999 to recover real estate in the United States that was purchased with funds that were allegedly misappropriated from the State of Ukraine by its former prime minister, Pavlo Lazarenko. UTI initially sued contending that the claims in its complaint belonged to Ukraine, and that UTI was prosecuting them under a power of attorney. (AERv4, 632-651 at ¶¶ 1, 26, 36, 43, 46, 47.)[1] Respondents moved to dismiss on grounds that UTI was not a real party in interest under Fed.R.Civ.P. 17(a).

UTI then produced a purported written assignment of claims, dated after the lawsuit was filed and signed by a Ukrainian deputy prosecutor. (AERv7, 1770-1772.) This purported assignment did not confer real party standing on UTI because, *inter alia*, the Ukrainian deputy prosecutor did not have authority under Ukrainian law to assign the ownership of Ukraine's claims to a third party. To confirm this, respondent Peter Kiritchenko initiated legal proceedings in Ukraine challenging the validity of the assignment. The trial and intermediate appellate courts in Ukraine ruled that the assignment was invalid, and the Supreme Court of Ukraine denied review. (AERv3, 248-254, 267-273, 323-330, 337-342.)

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1. "AER __" refers to Appellees' Excerpts of Record before the Ninth Circuit Court of Appeals. "ER __" refers to Appellant's Excerpts of Record in those same proceedings.

The Kiritchenko respondents[2] then filed a motion for summary judgment in the district court, arguing that (1) the assignment was invalid under the Constitution and statutes of Ukraine; and (2) under Fed. R. Civ. P. 17(a) the assignment was an untimely sham created post-filing in an attempt to overcome respondents' challenge to UTI's standing. (AERv2, 66-96.) Respondents presented the district court with the relevant Ukrainian statutes and constitutional provisions, and with expert declarations explaining Ukrainian law. (AERv3, 158-443; AERv4, 444-475; AERv7, 1773-1777, 1778-1784, 1813-1832; AERv8, 2066-2096.) Respondents also asked the district court to consider the Ukrainian courts' interpretation of their own law in the legal proceedings that respondent Peter Kiritchenko had pursued. (AERv3, 248-423.) In addition, respondents submitted a sworn declaration of the Ukrainian deputy prosecutor who executed the assignment, attesting that the document was prepared after the litigation was filed to avoid the dismissal of claims and "solely in order to give the court jurisdiction to hear *Ukraine's* claims." (AERv2, 101-106.)

The district court granted respondents' motion for summary judgment in an unpublished order, finding that UTI lacked standing because it was not a real party in interest under Fed.R.Civ.P. 17(a). (Petition App. 6-60.) In a thoughtful and well-supported decision, the district

2. Throughout this brief, "Kiritchenko respondents" refers to respondents Peter Kiritchenko, Izabella Kiritchenko, Ludmilla Kiritchenko, Brancross U.S. Holdings, Inc., BRC Property Holdings, LLC, Xanadu Property Holdings, LLC, ABS Trading, Inc. and Michael Menko.

court examined Ukrainian law under Fed.R.Civ.P. 44.1 and held:

> Having read and considered the applicable statutes, constitutional provisions, and expert opinions, the court finds, even without consideration of the Ukrainian court decisions, that the PGOU [Prosecutor General's Office of Ukraine] lacked the authority to assign claims of Ukraine to UTI.

(Petition App. 55.) The district court also reviewed the Ukrainian court decisions and held that they were "in accord with th[e] Court's finding and provide[d] further support therefore." (*Id.*) The district court held that the act of state doctrine did not bar the court from ruling upon the legal validity of the assignment because (1) the government of Ukraine, by its courts, had itself invalidated the assignment; and (2) the doctrine did not apply because the act of state in question was not committed entirely within Ukraine. (Petition App. 23-27.)[3]

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3. UTI erroneously states that on June 2, 2000, the first district court judge assigned to this case "denied defendants' motion to dismiss the second amended complaint, ruling that the August 11, 1999 assignment was valid," and that the subsequent district court judge "reconsidered [that] ruling without mentioning it." (Petition at 12.) To the contrary, during the June 2, 2000 hearing, the first district court judge expressly stated that he was not ruling on the validity of the assignment, noting that at that time, there were no decisions from a Ukrainian court addressing the matter, and acknowledging that the validity of the assignment was an issue that would "undoubtedly" need to be revisited at a later date, most likely under Fed.R.Civ.P. 44.1. (AER v3, 440-443.) That is precisely what the second district court judge did.

UTI argues that the Supreme Court of Ukraine, in a 2006 ruling rendered after the district court's summary judgment order, affirmed the validity of UTI's assignment. That argument was rejected by the district court in the context of a post-judgment proceeding under Fed.R.Civ.P. 60(b). (Petition App. 78-85.) The district court correctly held that the new Ukrainian Supreme Court order was irrelevant because (a) it was based upon procedural deficiencies and did not purport to find the assignment legally valid, and (b) in granting summary judgment the district court had conducted an independent evaluation of Ukrainian law that did not depend upon the decisions of the Ukrainian courts. (Petition App. 82-84.) UTI appealed both the original summary judgment order and the subsequent order refusing to change the outcome due to the 2006 ruling of the Supreme Court of Ukraine. (ERv1, 3-4; ERv1, 6-7.)

In an unpublished Memorandum decision, the Ninth Circuit Court of Appeals affirmed. It held that (a) the district court had not erred in concluding that the assignment was invalid under Ukrainian law; (b) the purported assignment was a sham created only to overcome respondents' challenge to standing and could not confer standing under Fed.R.Civ.P. 17; and (c) UTI had failed to demonstrate that the assignment constituted the act of a foreign sovereign power, so the act of state doctrine was inapplicable. (Petition App. 1-3.)[4]

4. UTI erroneously states that the court of appeals "declined to consider any supplemental grounds for standing, (Cont'd)

UTI requested panel rehearing or rehearing en banc. The panel rejected rehearing. The suggestion for rehearing en banc was circulated to the full court, and no judge requested a vote on whether to rehear the matter en banc. (Petition App. 86-87.)

UTI's Petition raises political developments in Ukraine since the conclusion of the Ninth Circuit appeal in an attempt to argue that the current Ukrainian government would support UTI's position. Those facts are not in the record and should not be considered, but they are irrelevant in any case. Although it could easily have done so, the Ukrainian government never provided evidence or argument in this litigation to support the validity of the challenged assignment. It never urged the district court or the court of appeals to rule in UTI's favor. To the contrary, the Ukrainian deputy prosecutor general who executed UTI's purported assignment provided respondents' counsel with a declaration supporting respondents' position (AERv2, 101-105), and the Prosecutor General's Office of Ukraine confirmed in proceedings before the Supreme Court of Ukraine that it did not actually assign any claims to UTI, but merely authorized UTI to act as an "agent . . . to fulfill certain legal actions on behalf of and at the expense of . . ." the Prosecutor's office. (AERv3, 427.) Such agency could not give UTI standing as a real party in interest.

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such as UTICo's rights under the implemented agreements with Ukraine, enforcing its equitable lien, constructive trust, and equitable subrogation." (Petition at 21.) To the contrary, the court of appeals stated: "We have considered the other issues raised by UTI in its opening brief and reject them as meritless." (Petition App. 2.)

REASONS FOR DENYING THE PETITION

The decision of the Ninth Circuit Court of Appeals was correct and does not conflict with any decision of this Court or another court of appeals. Both the district court and the court of appeals correctly interpreted the law of Ukraine, which was controlling. Their interpretations of Ukrainian law were consistent with what the Ukrainian courts decided, as well as with the Constitution and statutes of Ukraine and the experts' opinion. There is no good reason for this Court to further interpret the law of Ukraine. To the extent that United States federal law was implicated, the district court and court of appeals correctly applied settled principles of law, and this case does not raise any important issue of federal law. For these reasons, the Petition for Writ of *Certiorari* should be denied.

I. The Courts Below Properly Concluded That Petitioner Lacked Standing As a Real Party in Interest

Petitioner argues that the district court and court of appeals erred by not determining that the assignment was valid based upon a 2006 ruling of the Supreme Court of Ukraine, which petitioner contends held that the assignment of claims was valid under Ukrainian law. Petitioner is wrong for several reasons.

(a) As the district court properly concluded, the 2006 ruling was made on procedural issues, and did not hold that the assignment was valid. (Petition App. 83-84; ERv2, 14. *See also* Petition App. 2.)

(b) The Ukrainian courts actually determined that the assignment was invalid. There were two relevant decisions by the Supreme Court of Ukraine. The 2006 ruling relied upon by UTI was rendered in Ukrainian litigation instituted by respondent Pavlo Lazarenko, and did not decide the issue of the assignment's legal validity. (*Id.*) In litigation instituted by respondent Peter Kiritchenko, the Ukrainian Supreme Court had already denied review on the merits of an appellate decision holding the assignment of claims to be invalid. (Petition App. 9-15, 29; AERv3, 337-342.)[5]

(c) The district court performed an independent analysis of the Ukrainian Constitution and statutes and correctly concluded that Ukrainian prosecutors have power to represent the state, but not to assign away its claims. (Petition App. 46-57.) This interpretation was supported by declarations of Ukrainian law experts submitted in support of the respondents' motion for summary judgment and properly considered under Fed.R.Civ.P. 44.1. (Petition App. 49-50.)

(d) The Ninth Circuit Court of Appeals concluded, based upon the facts in the record, that the assignment document was a post-filing sham under Fed.R.Civ.P. 17. (Petition App. 2.) That finding provided an independent basis under United States law for the dismissal of UTI's

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5. UTI erroneously states that the district court should not have relied on the Ukrainian court rulings in Mr. Kiritchenko's case because UTI was not served with process in those proceedings and because the ruling that the assignment was invalid was "dicta." (Petition at 27-28.) However, both the district court and the court of appeals considered and properly rejected these arguments. (*See* Petition App. 2, 12, 29, 45-46.)

suit, regardless of Ukrainian law on the authority of deputy prosecutors to assign claims.

Petitioner's arguments based upon Ukrainian court proceedings are wrong but, perhaps more importantly for present purposes, there is no good reason for this Court to clarify or interpret the law of Ukraine. Such an exercise would require this Court to analyze numerous decisions of the Ukrainian courts, as well as the Constitution and statutes of that country and experts' opinions on Ukrainian law, and then pronounce what Ukrainian law is on an issue already decided by the legislature and courts of Ukraine. No issues of United States federal law would even be involved.

II. The Courts Below Properly Considered the Applicability of the Act of State Doctrine

Petitioner argues that the district court and court of appeals erred by not concluding that the act of state doctrine mandated that United States courts accept the purported assignment of claims by a Ukrainian deputy prosecutor. Petitioner is wrong for several reasons.

(a) The decisions of the Ukrainian courts, as well as that country's statutes and Constitution and expert opinions, establish that the assignment was invalid under Ukrainian law. (Petition App. 46-57.) Contrary to petitioner's assertion, the district court properly found that the 2006 ruling of the Supreme Court of Ukraine did not hold that the petitioner's assignment of claims was valid. (Petition App. 83-84; ERv2, 14; *see also* Petition App. 2) For this Court to require acceptance of the assignment would turn the comity-based act of state

doctrine on its head because it would result in the courts of the United States validating an assignment that the courts of Ukraine held to be invalid.

(b) The Ninth Circuit's ruling that the purported assignment was a sham under Fed.R.Civ.P. 17 is an independent basis under United States law for the dismissal of petitioner's claims. (Petition App. 2.) The act of state doctrine is not implicated with respect to dismissal on this basis. Even if a Ukrainian deputy prosecutor had legal authority to assign away claims (which he did not), under American law he could not sign an assignment after the case was instituted solely to provide a basis for the court to hear Ukraine's (not Petitioner's) claims. That is what the deputy prosecutor attested that he did, and it is impermissible under Fed.R.Civ.P. 17.

(c) The act of state doctrine was formulated by the courts to avoid potential embarrassment to the Executive Branch in the conduct of foreign relations. *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989). Here, the Executive Branch, through the Department of Justice, was a party to the litigation, having intervened long before respondents filed their summary judgment motion. (ER6, 63.) The Executive Branch never opposed respondents' attempts to have the case dismissed in the district court or the court of appeals based on the invalidity of the purported assignment.

(d) Contrary to petitioner's suggestion, the district court did not create a new, arbitrary rule under the act of state doctrine, and its interpretation of the doctrine did not deviate from this Court's precedent. The district

court properly held that the act of state doctrine cannot apply where, as here, the foreign government (the courts of Ukraine) concedes the unlawfulness of the act in question (the invalid assignment). (Petition App. 24-25.) The district court also relied upon settled federal precedent that the act of state doctrine applies to the acts of a foreign sovereign committed within its own territory, while in this case the act of the Ukrainian deputy prosecutor was extraterritorial. (Petition App. 25-27.) The purported assignment was a document that said Ukraine "will assign" to UTI claims to real estate located in the United States and owned by United States citizens and legal residents "to the extent that you [UTI] can prove in your [U.S.] Federal Court the unlawful ownership of such real estate . . ." (AERv7, 1770-1772.) The district court properly relied upon established precedent on this issue. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Liu v. Republic of China*, 892 F.2d 1419, 1433 (9th Cir. 1989); *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1025 (5th Cir. 1972); *Tabacalera Severiano Jorge v. Standard Cigar Co.*, 392 F.2d 706, 715-16 (5th Cir. 1968); *Republic of Iraq v. First National Bank*, 353 F.2d 47, 51 (2nd Cir. 1965). (*Id.*) This litigation provides no reason for this Court to revisit existing law on the act of state doctrine.

(e) The court of appeals properly held, based upon the factual record, that UTI had ". . . failed to demonstrate that the assignment constitutes the act of a foreign sovereign power; the act of state doctrine is therefore inapplicable. *See Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989) ('The burden of proving acts of state rests on the party asserting the

applicability of the doctrine')." (Petition App. 2.) Again, both the deputy prosecutor who executed the assignment document and the Prosecutor General's Office in Ukrainian pleadings disavowed the notion that the government of Ukraine had actually assigned the ownership of claims to UTI. (AERv2, 101-105; AERv3, 427.) Moreover, the Ukrainian courts held that the assignment was not a valid act of Ukraine. There is no good reason for this Court to reevaluate these factual findings.

III. This Court Should Not Decide the Scope of Implied Powers Under the Ukrainian Constitution

Petitioner's third and final argument is that this Court should decide the scope of implied powers under the Ukrainian Constitution in order to conclude that the deputy prosecutor did have authority to assign away claims. As it was appropriate to do under Fed.R.Civ.P. 44.1, the district court carefully examined the Ukrainian Constitution, relevant Ukrainian statutes, the opinions of Ukrainian law experts, and the decisions of a multitude of Ukrainian judges in numerous court decisions. (Petition App. 46-57.)[6] The court of appeals

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6. UTI erroneously states that "[t]he District Court's refusal to give extraterritorial effect to the August 11, 1999 assignment is inconsistent with United States policies that (1) permit foreign nations to sue in this country" and that "[t]he District Court's interpretation of Ukraine's Constitution . . . leaves no organ of the state with the authority to prosecute illegal transportation of public property outside the country . . . " and "frustrates Ukraine's ability to act in its interest abroad." (Petition at 36, 40, 41.) To the contrary, the District Court recognized that the PGOU itself was authorized to prosecute actions in court on behalf of the State of Ukraine, and

(Cont'd)

considered and affirmed this careful analysis. (Petition App. 2.) There is no good reason for this Court to engage in developing Ukrainian constitutional law.

CONCLUSION

For the foregoing reasons, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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(Cont'd)

the State of Ukraine could have instituted action in its own name in the district court. (Petition App. 47.) What the district court and court of appeals held was that a deputy prosecutor of the PGOU did not have legal authority to assign to third parties (such as UTI) claims belonging to the State of Ukraine, and that in any event, the purported assignment here was a post-filing sham under United States law. (Petition App. 2, 57.)